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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CYNTHIA CHILDERS, Plaintiff and Appellant, v. JOANNE HAYES-WHITE, as Fire Chief, etc., et al., Defendants and Respondents.	A113610 (San Francisco County Super. Ct. No. 502249)

Cynthia Childers appeals from an order denying her petition for administrative writ of mandamus, filed after the San Francisco Fire Commission (the commission) terminated her employment as a firefighter with the San Francisco Fire Department (SFFD). We affirm.

BACKGROUND

Plaintiff was terminated for intoxication while on duty on November 14, 2001. She had been drinking heavily the previous week, and drank heavily through the night of November 13. She reported to duty at 8:00 a.m. She remained on duty during the day, during which, by her admission, she consumed a bottle of vanilla extract. She was on duty at dinner time, when she passed out at the dinner table. She could not be roused, and paramedics were called. Plaintiff spent the night at a hospital. Her blood alcohol level was tested, twice. Both tests reported her blood alcohol level as being 0.45 percent—an acute level of intoxication. Plaintiff was suspended. On December 19, 2001, realizing she was an alcoholic, plaintiff enrolled in an in-patient treatment program

for chemical dependency. She followed up with programs designed to keep her clean and sober. By all appearances, the programs have been successful.

On February 27, 2002, plaintiff returned to light duty position with the SFFD, where she performed well. On June 3, 2002, Mario Trevino, then the Chief of SFFD, filed a complaint with the commission, recommending termination of plaintiff's employment. The commission conducted a full hearing on the matter. After the hearing, the commission, on September 4, 2002, voted to dismiss plaintiff. The commission later denied plaintiff's motion for reconsideration.

Plaintiff filed her petition for writ of mandate, contending (1) the commission lacked just cause to terminate her from her job; (2) in recommending plaintiff's termination, Chief Trevino had, in effect, implemented a change in SFFD's substance abuse policy without first meeting and conferring with the Firefighter's Local Union 798 (Local 798), violating the Meyers-Milias-Brown Act, Government Code section 3300 et seq. (MMBA); and (3) the evidence supported an inference plaintiff was discriminated against because of her gender.

Plaintiff claimed that SFFD's established method for handling violations of the policy prohibiting substance abuse was to charge the violator with misconduct, but then to allow the violator to enter into a "last chance" agreement in lieu of termination. A "last chance agreement" is an agreement between the chief of SFFD and a firefighter in which the firefighter essentially is terminated for a first-time violation of the substance abuse policies, but the termination is held in abeyance for a finite period of time to give the firefighter one "last chance" at continued employment as long as he or she remains free from substance abuse during that time. The agreement includes an acknowledgment by the parties to it, including Local 798, that "the agreement is a stand alone agreement and is not to be considered precedent setting in any other grievance, litigation, or disciplinary proceeding." Plaintiff submitted a report that, during the five years preceding her termination, three other firefighters had been reported for violating the SFFD's policy against on-duty consumption of alcohol or illegal substances. One had tested with a .06 blood alcohol level. One had tested positive for cocaine. The third had

refused to submit to a substance abuse test. The firefighter who refused to submit to a test had been terminated from his employment. The other two firefighters had received "last chance agreements." Chief Trevino testified several other firefighters had been offered "last chance agreements" as a result of off-duty conduct.

Plaintiff also claimed drinking was rampant in fire stations and most cases of on-duty drinking were handled informally at the station level by senior officers who covered for their subordinates.

In April 2003, plaintiff filed an administrative charge and a complaint of discrimination with the California Department of Fair Employment and Housing, claiming discrimination on the basis of gender and disability. She received a right to sue letter in April 2004, and is pursuing those claims by means of a separate suit. (*Childers v. City and County of San Francisco, et al.* (Super. Ct. San Francisco County, 2005, No. 440527).) Those proceedings are not at issue here.

On January 10, 2006, the trial court denied the petition for writ of mandate, supporting its order with a detailed statement of decision. The court found no abuse of discretion in the decision to terminate plaintiff. It found no violation of the MMBA. It found no basis in the administrative record for plaintiff's claim of gender discrimination. Finally, the court struck certain declarations filed by plaintiff in support of her claims, finding they were not admissible as "new discovered evidence," and did not add anything of substance to plaintiff's arguments.

DISCUSSION

Before addressing plaintiff's specific claims, we take note of the claims she does *not* make. First, plaintiff does not contend her conduct was acceptable. As she concedes, her conduct was a clear violation of the SFFD substance abuse policy. It violated SFFD Rule 3912.[1] Plaintiff also does not dispute Article 39 of the SFFD rules authorized the

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[1] Rule 3912 provides:

"1. Members shall at no time bring into or keep in or about the stations or premises of [SFFD] any intoxicating liquor, drug, substance or compound.

commission to dismiss her for her conduct. Article 39 of the rules expressly provides violation of Rule 3912 "shall be considered sufficient cause for disciplinary action up to and including dismissal." Similarly, the City of San Francisco's Drug and Alcohol Free Workplace Policy prohibits the consumption of alcohol during work hours and recites that an employee who violates the policy "will be subject to discipline up to and including termination." In addition, while plaintiff claimed, generally, she was singled out for special treatment as a result of her gender, she did not use the administrative hearing or the writ proceedings to litigate a claim of gender discrimination.

Plaintiff contends here, has she did below, that despite clear authority to dismiss her for her on-duty consumption of alcohol, the commission abused its discretion by following Chief Trevino's recommendation to terminate her employment. She claims that irrespective of the SFFD rules, the SFFD had a past practice of offering "last chance agreements" to persons who violated the substance abuse policy. Plaintiff contends it was not entitled to change that practice and terminate her employment without first negotiating with Local 798. Plaintiff also contends the trial court abused its discretion by striking the declarations she had filed in support of her contentions.

I.

Commission's Discretion

The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless there has been an abuse of discretion. (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404 (*Barber*); *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217 (*Skelly*).) Neither a trial court nor an appellate court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. (*Barber, supra,* at p. 404; *California Real Estate Loans, Inc. v. Wallace* (1993)

"2. Members shall not report for duty at their places of assignment under the influence of any intoxicating liquor, drug, substance or compound, and they shall not have any of these intoxicants/drugs in their possessing at such time. They shall not ingest or consume, or be under the influence of these intoxicants/drugs while on duty or while in uniform off duty."

18 Cal.App.4th 1575, 1580.) If reasonable minds may differ with regard to the propriety of the disciplinary action, no abuse of discretion has occurred. (*Flippin v. Los Angeles City Board of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279.) In considering whether the administrative agency abused its discretion in the context of employee discipline, the overriding consideration is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service. (*Skelly, supra,* at p. 218.) In considering this question, we conduct a de novo review, giving no deference to the trial court's determination. (*Ibid.; Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46.)

Plaintiff complains the commission simply rubber-stamped Chief Trevino's recommendation, a claim we interpret as asserting the commission failed to exercise its discretion. The decision was made after a lengthy hearing, conducted by seasoned commissioners, who actively participated in the questioning and demonstrated a clear and correct understanding of their role in the process. Chief Trevino spoke to the commission's authority, responding to a question that "[t]he ultimate authority rests with the Fire Commission." Plaintiff's attorney also addressed the commission's authority, asserting, "[A]s you know, this is a termination case, and I think that all of you would agree that under the charter, you would provide a fair and full trial to any firefighter subjected to discipline, and you have to determine for yourselves whether there is just cause for the discipline, and whatever proposed discipline that there is, the final decision, as Chief Trevino recognized when we spoke to him, is yours." Counsel later acknowledged the experience of the commission, stating, "The second thing that you consider is the appropriateness of the penalty, and I'm sure that I'm preaching to the choir and you all have done this many times." Any suggestion the commissioners were unaware of their obligations or abdicated them to Chief Trevino is thoroughly refuted by the record.

While reasonable minds could differ—and indeed reasonable minds *did* differ, as two commission members voted not to adopt Chief Trevino's recommendation—the decision to terminate plaintiff was a matter well within the commission's discretion. The

decision was authorized by Article 39 of the SFFD rules. Plaintiff's on-duty intoxication rendered her completely unable to perform her public duties. It was injurious to her, and it placed both the public and her fellow firefighters at risk. Plaintiff's conduct harmed the public service, and if repeated would again harm the public service.

Plaintiff's situation is distinguishable from that in *Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541 (*Blake*), which she cites, where the court found the board abused its discretion by terminating the employment of a state deputy labor commissioner for an incident occurring at a state bar convention. The deputy apparently was romantically involved with a female attorney who also was attending the convention. After a late dinner, including the consumption of alcohol, the deputy followed two male attorneys who had driven the deputy's romantic interest back to her room. When the men approached the deputy's car, he pointed a revolver at one of them, telling him in obscene terms to stay away from the female attorney. (*Id.* at pp. 546-547.) The court held there was only an inference the deputy's conduct resulted in or would be likely to result in harm to public service, citing the board's finding the conduct " 'would cause' the two male attorneys to be apprehensive of their safety should [the deputy] misinterpret their future contacts with the female attorney while in the performance of their official duties." (*Id.* at p. 551.) The court further found little likelihood a similar incident would occur in the future. It pointed out the male attorneys were from San Francisco and the female attorney was from Long Beach. In addition, the deputy had apologized to the male attorneys for his conduct, and later assured the board the incident would not recur, testifying he no longer had a relationship with the female attorney and no longer owned a gun. (*Id.* at pp. 553-554.) We suspect *Blake* would be decided differently today. Even if it reflects the current state of the law, it establishes no more than that it would be an abuse of discretion to dismiss an employee because of an off-duty incident that is unlikely to recur, where the incident did not clearly and directly result in some harm to the public service. Here, the misconduct occurred while plaintiff was on active duty, rendered her incapable of performing her job—which was to protect the public safety—and interfered with the ability of her colleagues to perform their jobs as well.

Plaintiff complains she received a more severe form of discipline than the firefighters who had been offered "last chance agreements." The very nature of discretion is that it allows a body, such as the commission, to make decisions within a range of possibilities and to distinguish between similar situations without being second-guessed. The commission's decision to dismiss plaintiff was authorized by the SFFD's rules and policies, was a decision within the commission's discretion and was an appropriate response to plaintiff's conduct. That others received lesser forms of discipline, even had their conduct been identical to plaintiff's, provides no basis for judicial interference.

Plaintiff argues Chief Trevino's recommendation to the commission to terminate plaintiff's employment was arbitrary and capricious. We review the commission's decision, not Chief Trevino's recommendation. As discussed previously, the record is inconsistent with a claim the commission either was unaware of its responsibility to make its own decision or failed in that responsibility. We are not here concerned with Chief Trevino's motives. Whether his recommendation, or the commission's decision, was made for an improper reason, such as gender discrimination, is not before us.

Plaintiff also complains the trial court misunderstood the evidence, and concluded only Chief Trevino could offer plaintiff a "last chance agreement."[2] We do not read the testimony in question as establishing the commission itself had the power to offer plaintiff a "last chance agreement."[3] In any event, as our task is to review the

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[2] Plaintiff refers to the court's assertion, in its statement of decision, "as Trevino testified, the decision whether to agree to a 'last chance agreement' lies solely within the Chief of [SFFD]—who, under the Rules, has full authority to recommend immediate dismissal of a firefighter for misconduct without giving him or her a 'last chance agreement.' "

[3] Chief Trevino was asked, "[A]re you aware that in past cases, the chief has generally recommended termination, and still there's been a last-chance agreement?" He responded, "Yes, I'm aware of that, and that's strictly a product, I believe, of the fact that the ultimate decision rests with the Fire Commission, as we said at the opening of the discussion. It's my role as Fire Chief to make a recommendation to the Commission." This testimony is consistent with the understanding the Commission can reject a fire

commission's decision for abuse of discretion. We are not concerned with the trial court's interpretation of Chief Trevino's testimony.

In sum, after conducting a de novo review of the proceedings, we find the commission did not abuse its discretion by deciding to dismiss plaintiff from her employment.

II.

The MMBA

The MMBA requires public agency employers to meet and confer in good faith with representatives of any recognized employee organization on issues of wages, hours and other terms and conditions of employment, and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (Gov. Code, §§ 3505.) Plaintiff contends the decision to dismiss her for a first-time violation of the substance abuse policy was a change in SFFD's long-standing practice of negotiating "last chance" agreements with violators, arguing SFFD therefore was required to bargain with her union, Local 798, before adopting the new course of action.

It has been held, as plaintiff asserts, the MMBA can be violated by unilateral alterations in past practices. (*Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291 (*Riverside*).) For this rule to apply, the affected party first must establish the existence of a past practice, requiring a showing the "practice" is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Ibid*., citing *California State Employees Association, SEIU Local 1000* (2002) PERB Dec. No. SA-CO-237-S [26 PERC ¶ 33058, p. 18].) The party seeking to show a past practice bears the burden of establishing these elements. (*Ibid.*) To the extent the question involves the resolution of facts, we review the record to determine if the trial

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chief's recommendation for termination of employment after the fire chief has entered into a "last chance agreement" with the affected firefighter.

court's decision was supported by substantial evidence. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 544.) To the extent it involves an interpretation of statute, we review the matter de novo. (*Ibid.*)

Plaintiff established two persons had received "last chance agreements" over a five-year period. A third person had been terminated after refusing to submit to a test for substances, and other persons had received "last chance agreements" for off-duty conduct. Captain Mark Donnelly, a 28-year veteran, testified diversion had been offered in all the cases of which he knew where a firefighter had tested positive. Captain Joseph Moriarty, a 27-year veteran and an official with Local 798, testified that over the past five years he knew of no case, besides plaintiff's, where an offender was not given a "last chance agreement." This evidence might be enough to create an expectation and hope that a violator would receive a last chance agreement, but it falls short of establishing an unequivocal, clearly enunciated and acted upon practice accepted by both parties.

The situation is somewhat similar to that in *Riverside, supra*, 106 Cal.App.4th 1285. The employee in that case, a deputy sheriff who had been injured in the course of her employment, sought to show the sheriff's department had a past practice of granting step increases to deputy sheriffs on disability leave. She produced evidence two deputies had been granted step increases while on leave. (*Id*. at p. 1291.) She also produced evidence the sheriff's department command staff had discussed the question shortly before the plaintiff was injured. The command staff recognized step increases had been granted in the past, but decided no increase should be granted to deputies who had not worked for roughly half a year. It decided, further, the policy was to be implemented uniformly but each deputy's situation should be considered on its own. (*Id.* at p. 1292.) The court held the evidence did not meet the plaintiff's burden of establishing a past practice that was "unequivocal, regular and consistent, clearly enunciated or readily ascertainable over a reasonable period of time." (*Ibid.*) The same is true here.

Finally, any finding of past practice is wholly inconsistent with the acknowledgement and agreement of the parties to "last chance agreements" that they are "not to be considered precedent setting in any other grievance, litigation or disciplinary

proceeding." The only reason for including such terms is to make it clear the agreements may not be viewed as establishing any kind of regular practice.

As plaintiff did not establish a past practice, she also did not show a violation of the MMBA. We do not consider SFFD's alternative contention that elements of collateral estoppel bar plaintiff's MMBA argument, a contention based on the Public Employees Relations Board's rejection of the same argument in connection with an unfair labor practice charge filed by Local 798 after plaintiff's discharge.[4]

III.

Declarations Filed in Support of Plaintiff's Claim

Plaintiff attempted to support her petition with the declarations of several firefighters. As the trial court found, the substance of the declarations may be summarized as (1) plaintiff was the only firefighter not offered a "last chance agreement" in the SFFD for violating the SFFD rules regarding alcohol use; (2) some of the declarants had heard rumors of SFFD personnel drinking while on duty and some personally had observed SFFD personnel drinking while on duty, both before and after plaintiff's dismissal hearing; and (3) plaintiff was not offered a last chance agreement because of her gender. As plaintiff did not obtain the declarations until after the administrative hearing, they were not a part of the administrative record.

The general rule is that "a hearing on a writ of administrative mandamus is conducted solely on the record of the proceeding before the administrative agency." (*Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881.) Code of Civil Procedure section 1094.5, subdivision (e) carves out a limited exception, authorizing a reviewing court to consider "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent." "Augmentation of the administrative record is permitted only within the strict limits set forth in the statute. [Citations.] . . . Determination of the

[4] We have taken judicial notice of the State of California Decision of the Public Employment Relations Board in the matter of *San Francisco Firefighters Union, Local 798 et al. v. City and County of San Francisco* (April 2, 2004, case No. SF-CE-53-M) PERB Dec. No. 1611-M.

question is within the discretion of the trial court; we will not disturb the exercise of that discretion unless it is manifestly abused. [Citation.]" (*Armondo v. Department of Motor Vehicles* (1993) 15 Cal.App.4th 1174, 1180.)

The declarations are not particularly relevant. Much in them is hearsay or states only the declarants' personal beliefs, none of which is evidence of a disputed fact. It was not, and never had been, disputed plaintiff was the only firefighter terminated for on-duty drinking after submitting to a substance abuse test without first being offered a "last chance agreement." Evidence of actions taken to cover up on-duty drinking, even if admissible, do not support a claim that plaintiff's dismissal by the commission was an abuse of discretion. If anything, they support the opposite, tending to show action taken to prevent other firefighters from being brought before the commission where they might suffer a similar fate. In any event, it is undisputed on-duty drinking is an offense justifying termination of employment, even if it is tolerated or covered up in many, or most, instances. We recognize plaintiff's arguments are that the decision to dismiss her was arbitrary because she was dismissed while other firefighters, who had engaged in similar conduct, were retained or not even brought before the commission. For purposes of this action, however, it is of little matter that the SFFD, or even the commission, treated different firefighters differently. As stated earlier, different treatment is the essence of discretion. The commission abused its discretion only if it lacked the authority or the discretion to terminate plaintiff's employment. It had the requisite authority and discretion. Whether plaintiff was singled out for an improper reason, such as gender discrimination, is an issue to be determined in her FEHA case, but is not an issue here.

We also agree with the trial court that much of the material in the declarations could have been discovered prior to the hearing. While plaintiff asserts the existence of a long-standing culture of covering up on-duty drinking, the declarations themselves refute any claim there was no means of learning of it or of finding a person willing to speak of it. One declarant, for example, complains of numerous acts of retaliation taken against him since January 2000 because of his continued outspoken advocacy on the issue of

on-duty drinking and his criticism of the SFFD's handling of that problem and other matters. The declarations also describe an incident occurring after plaintiff's dismissal which, according to the declarants, demonstrated Chief Trevino's interest in covering up on-duty drinking. While the evidence arguably is relevant to plaintiff's claim she was singled out for dismissal, it does not and cannot refute that the commission acted properly or that her dismissal was appropriate and authorized by SFFD rules.

The trial court did not abuse its discretion by striking the declarations.

IV.

Laches

As we find nothing in plaintiff's contentions requiring reversal of the order denying the petition for writ of mandate, we need not and do not consider SFFD's contention her petition was barred by the doctrine of laches.

CONCLUSION

The order denying the petition for writ of mandate is affirmed.

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STEIN, J.

We concur:

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MARCHIANO, P. J.

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MARGULIES, J.